

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Court of Appeals of the District of Columbia

APRIL TERM, 1930

No. 5211

866

HELEN P. MERRITT, APPELLANT,

vs.

ROBERT G. MERRITT.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

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Court of Appeals of the District of Columbia

No. 5211.

HELEN P. MERRITT, Appellant,

vs.

ROBERT G. MERRITT.

a . Supreme Court of the District of Columbia.

Equity. No. 43850.

HELEN P. MERRITT, Plaintiff,

vs.

ROBERT G. MERRITT, Defendant.

UNITED STATES OF AMERICA,

District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 In the Supreme Court of the District of Columbia.

Equity. No. 43850.

HELEN P. MERRITT, Plaintiff,

vs.

ROBERT G. MERRITT, Defendant.

Bill of Complaint for Divorce a Mensa et Thoro.

Filed Mar. 25, 1925.

To the Honorable the Supreme Court of the District of Columbia:

The petition of Helen P. Merritt respectfully represents as follows:

1. That she is a citizen of the United States, a resident of the District of Columbia and has been for more than three years preceding the filing of this suit.

2. That the defendant, Robert G. Merritt, is a citizen of the United States, a resident of the District of Columbia and is sued as the husband of the plaintiff for the relief hereinafter prayed.

3. That the plaintiff and defendant are husband and wife and were lawfully married to wit, on the 29th day of September 1913 at Rockville, Maryland, by a duly ordained Minister of the Gospel, legally authorized to perform said marriage ceremony.

4. That since the said marriage between the plaintiff and defendant they have lived and cohabited as husband and wife up to and until to-wit, October 1924, when and at which time, as hereinafter alleged, the plaintiff by reason of the defendant's cruel treatment to her, was forced to leave him. That thereafter, to-wit, on the 1st day of Nov., 1925, plaintiff and defendant became reconciled and have lived together as husband and wife in said District until to-wit, the 24th day of March 1925, when and at which time, plaintiff was again forced to leave defendant by reason of his cruel treatment to her as will hereinafter more fully appear.

5. That two children have been born as issue of said marriage to plaintiff and defendant, Helen Christine, born July 22, 1914, and Robert Gwathmey, born April 6, 1917, both of whom are now in the custody of plaintiff.

2 6. That immediately after said marriage, defendant began to treat plaintiff in a cruel and inhuman manner, subjecting her to the greatest indignities and insults and physical violence; that defendant has been profane and obscene in his conversation with plaintiff and has cursed and abused her and on divers occasions has assaulted her with physical force and violence.

Defendant through his ill-treatment of plaintiff, as will hereinafter more particularly appear, has seriously injured and affected plaintiff's physical health, impaired her nervous system and caused her mental pain and anguish continuously for many years last past.

That to-wit, July 1, 1914, August 12, 1914, August 1, 1924, September 1, 1924, and on divers other dates, defendant has struck and abused plaintiff without justification and excuse. That he has been repeatedly cruel to the children and

habitually uses profane and obscene language in their presence; he is careless, and is careless in his personal attire before them; that in the presence of said children he has frequently struck plaintiff and threatened to kill her and said children. Plaintiff believes that defendant will carry out his threats to kill her or do her and said children serious bodily harm unless restrained by this Honorable Court.

That defendant has on divers occasions threatened, by the most adroit means to cause the death of people whom he dislikes; that defendant has on divers occasions told plaintiff that if she took legal action to protect herself and the children, he would take the children from the jurisdiction and that she would never see them again, which threat the plaintiff believes the defendant will carry out unless restrained by this Honorable Court.

That on the 26th day of September 1924, plaintiff instituted a suit in this Court, entitled Helen P. Merritt, plaintiff, vs. Robert G. Merritt, defendant, Equity No. 43110 and in said suit among other things, prayed for a divorce a mensa et thoro and alimony pendente lite and permanently, and an order restraining defendant from molesting and interfering with her and said children; that this Honorable Court in this cause, passes an order granting to the plaintiff the sum of \$100 per month as alimony pendente lite and restrained the defendant from interfering and molesting her; that after said proceeding was begun, the defendant importuned plaintiff to return and live with him

3 and assured and promised her that he would treat her with conjugal kindness and the plaintiff believing that it was her duty to give defendant another chance leased an apartment in the Rochambeau Apartment House on to-wit, November 1, 1924, and resumed her marital relations with the defendant; that to-wit, within five days, defendant resumed his cruel and inhuman treatment toward plaintiff, calling her names in the presence of her children of the most degrading and obscene type without just cause, accusing her of unchastity with other men, threatening to kill her and the children if she ever attempted to leave him and take legal action in the Courts; that to-wit, in March 1925, the said defendant stated to plaintiff that he would not kill her but would *would* her to such an extent that she would have a chance to suffer and think over how badly she had treated him; that in the present month, to-wit, March

1925, defendant has accosted her upon the streets of the District of Columbia, calling her names of the vilest and most obscene type in the presence of passersby and in other public places.

That defendant has otherwise treated plaintiff in a cruel and inhuman manner; that by reason of said cruel and inhuman treatment defendant, to-wit, on the 24th day of March 1925, was compelled to leave him, and take her two children with her.

Plaintiff avers that she has always been a faithful, devoted wife and she has never given the slightest justification for the defendant's unwarranted and unjust accusations and cruel treatment of her.

Plaintiff is at present employed at a salary of \$1400 per annum and has no other income or estate of any character.

Defendant is at present employed and receives a salary of \$4,000 per annum.

Wherefore, premises considered, petitioner prays:

1. That a U. S. Writ of Subpœna issue out of this Honorable Court directed to the defendant Robert G. Merritt, directing him to appear herein on a date named and answer the exigencies of this petition.

2. That she be granted pendente lite and permanently the custody of her two minor children, Helen Christine and Robert Gwathemy.

3. That pending the final hearing of this cause, the Court restrain the defendant from coming to the apartment at the Rochambeau leased by the plaintiff or in any manner interfering with or molesting the plaintiff and the said children.

4. That plaintiff be granted alimony pendente lite and permanently for the support of herself and minor children, together with counsel fees and suit money.

4 5. That on final hearing, plaintiff be granted a divorce a mensa et thoro from the defendant with permanent alimony and custody of said minor children.

6. And for such other and further relief as the exigencies of the case may require and to the Court may seem meet and proper.

HELEN P. MERRITT.

W. A. COOMBE, *Atty.*

DISTRICT OF COLUMBIA, ss:

Helen P. Merritt, being first duly sworn according to law, on oath deposes and says that she has read the foregoing Bill of Complaint by her subscribed and knows the contents thereof, that those facts and matters therein stated she verily believes to be true.

HELEN P. MERRITT.

Subscribed and sworn to before me this 25th day of March, 1925.

[NOTARIAL SEAL.]

MABEL E. ASHLY,
Notary Public, D. C.

5 *Answer of Defendant, Robert G. Merritt*

Filed Apr. 3, 1925

Robert G. Merritt, defendant in the above-entitled cause, for answer to the bill of complaint and the motion for temporary alimony, custody of the children and temporary restraining order filed herein, says:

1. Defendant admits the allegations of the first paragraph of the bill.

2. Defendant admits the allegations of the second paragraph of the bill.

3. Defendant admits the allegations of the third paragraph of the bill.

4. Answering the fourth paragraph of the bill of complaint, defendant says that the separation occurred sometime in the latter part of September and not in October 1924, and denies that the reason for the separation was the cruel treatment by him to the plaintiff, and denies that the plaintiff was forced to leave him. Defendant admits that plaintiff and he were reconciled the latter part of October 1924, and lived together until March 24, 1925, when the plaintiff, without just cause or reason, deserted the defendant and refused to disclose her whereabouts until the filing of this suit, and defendant denies that the cause of the separation on March 24, was by reason of his cruel treatment.

6 Defendant further states that shortly after the reconciliation of the plaintiff and the defendant, the defendant left the city for South Carolina where he was

employed, about November 14, 1924, and on account of his employment, did not return to Washington until February 4th, 1925 which was the plaintiff's birthday, at which time he remained here several days and returned to the South again and did not permanently return to Washington until March 8th, 1925.

Defendant denies that he and the plaintiff have cohabited together as man and wife, but on the contrary defendant avers the fact to be that plaintiff has continuously, since the spring of 1917, refused such cohabitation except under the condition that he use precautionary measures to prevent her pregnancy.

5. Defendant admits the allegations contained in the fifth paragraph of the bill.

6. Defendant denies that he has treated the plaintiff in a cruel and inhuman manner, denies that he ever subjected her to indignities, insults and physical violence. Defendant admits that under the strain of extreme provocation and in the heat of quarrels he has occasionally used profane language in the presence of his wife, but such occasions were extremely rare and defendant has always frankly stated that after the occasion had passed, that he was sorry that it was necessary to use such language and begged forgiveness of the plaintiff. Defendant denies that he has ever been obscene in his conversation with the plaintiff, or that he has cursed and abused her, or assaulted her with physical force and violence.

Defendant denies that there was ever any ill-treatment to impair the health of the plaintiff and denies that her condition has been so impaired.

Defendant denies that he, on to-wit July 1st, 1914; August 12, 1914, August 1st, 1924, September 1st, 1924, or on any other dates, ever struck and abused the plaintiff; denies that he is or ever has been cruel to his children, or used profane and obscene language in their presence, or that he is careless in his personal attire before them; denies that he has ever struck the plaintiff in the presence of the children and emphatically denies that he has ever threatened to kill either his wife or his children, that he never had any intention of such a thing, and would under no circumstances cause either his wife or his children the slightest harm. Defendant further states that

he is devoted to his children and their welfare, and has only their best interest at heart.

Defendant denies that he has ever threatened to cause the death of people whom he dislikes, and denies that he ever threatened to take the children of the parties hereto from the jurisdiction of the courts, should legal action be taken against him by the plaintiff, and states to the court that it is absolutely unnecessary to restrain him from removing the children from the District of Columbia, or to place him under any restraining order, as he has no intention and never has had any intention of removing the children from the District of Columbia, or harming them or the plaintiff in any manner whatsoever.

Defendant admits that the plaintiff instituted suit against him in this court on September 26th, 1924, same being Equity No. 43110, and respectfully requests the court to consider the pleadings filed therein in the consideration and determination of the issues raised by the pleadings of this case. In addition to the general relief prayed by the plaintiff in her previous suit, she had defendant placed under a writ of ne exeat and required him to furnish bond in the sum of \$1000.00, and it was approximately one month later when the plaintiff and defendant were living together,

8 although her attorney refused to dismiss the suit until later. Defendant states that the reconciliation after the filing of the suit in September was welcomed by him as he earnestly believes that the best interests of his children can be subserved by keeping the home of the parties together, and the defendant denies that after such reconciliation he resumed his cruel and inhuman treatment toward the plaintiff calling her names in the presence of the children of the most degrading and obscene type. Defendant denies that he accused the plaintiff of unchastity with other men and denies that he threatened to kill her if she took legal action in the Courts, and denies that he ever threatened to make her suffer for any court action she might take, and denies that he has called her vile and obscene names in the public streets.

Defendant alleges that the cause of separation on March 24th, was the result of a dispute wherein the defendant requested the plaintiff to resign her position with the Chamber of Commerce, if she could not arrange to be released from her work at the regular hour when other employees

of the Chamber of Commerce were released. On the evening of March 23rd, plaintiff did not leave her place of employment until 6 P. M., although the other employees of the building were released at approximately 5 P. M. No notice was given defendant of the plaintiff's whereabouts; he was greatly disturbed and worried over her absence, and especially in view of the fact that she was not in the office room where her duties require her to be the greater part of the time.

Defendant alleges that he did not want the plaintiff to be employed as he was at this time making a substantial salary, and a great deal more than he had in previous years, and in previous years it was not necessary for the plaintiff to be employed. The explanation which the plaintiff gave

as to her whereabouts from 5 until 6 P. M. that evening was the cause of the quarrel between the parties. Up until the evening of March 23rd, the relations of the parties hereto had been extremely amicable and there was never any serious contentions from the time of their reconciliation in October until the 23rd of March.

Defendant denies that he has otherwise treated the plaintiff in a cruel and inhuman manner and as a result of said treatment plaintiff was forced to desert him on the 24th day of March 1925.

Defendant denies that he is employed at a salary of \$4000.00 per annum, but states the fact to be that he was dismissed from his employment on the 28th day of March chiefly on account of the publicity incident to the bill of complaint filed by the plaintiff. Defendant states that while he was in the South from November 15th, 1924 to March 8th, 1925, he forwarded to his wife his salary check in full, amounting to \$333.00 per month and that during this period he lived on the expense account which was furnished him by his employer. That his wife had full control of these various amounts of money averaging \$333.00 each month from November 15, 1924 to March 15, 1925, and in addition within the last 30 days defendant has purchased a fur coat for the plaintiff, the price of which was \$200, paid off a loan to plaintiff's sister which was \$200. Defendant is anxious to maintain his children but at the present time is out of employment but is doing everything in his power to obtain employment; that he has sent a great number of applications to various concerns who

might probably demand the service of someone in his particular line of work. In addition the defendant is in debt to various concerns and companies, and to individuals, including physicians and furniture companies, in an amount approximating \$1000.00. The defendant is carrying at this time \$22,000 live insurance of which the plaintiff is the beneficiary.

10 Defendant is ready and willing to make a home for his wife and children, feels that he will shortly have employment by which he will secure the financial means to maintain a home and is anxious willing and desirous that his wife and children join him, or that he be permitted to join them.

Wherefore defendant, having answered the bill of complaint herein, prays that the same and the injunction be dismissed.

ROBERT G. MERRITT.

R. E. LYNCH,
Attorney for Defendant.

DISTRICT OF COLUMBIA, ss:

Robert G. Merritt, being first duly sworn made oath that the allegations and statements contained in the foregoing answer are true to the best of his knowledge, information and belief.

ROBERT G. MERRITT.

Subscribed and sworn to before me this 2nd day of April, 1925.

[NOTARIAL SEAL.]

BERTHA G. HUNT,
Notary Public, D. C.

11 *Final Decree for Separate Maintenance.*

Filed Jun. 5, 1925.

Upon consideration of the Bill of Complaint filed in this cause, the temporary restraining order issued thereon, the motion for custody of children, the answer of the Defendant filed thereto, and the consent of the parties to his cause endorsed thereon, it is by the Court this 5th day of June, 1925,

“In the Supreme Court of the District of Columbia.

Equity. No. 43850.

HELEN P. MERRITT, Plaintiff,

VS.

ROBERT G. MERRITT, Defendant.

Final Decree for Separate Maintenance.

Upon consideration of the Bill of Complaint filed in this cause, the temporary restraining order issued thereon, the motion for custody of children, the answer of the Defendant filed thereto, and the consent of the parties to this cause endorsed thereon, it is by the Court this 5 day of June, 1925, ordered as follows:

1. That the plaintiff Helen P. Merritt be, and she hereby is awarded permanently the exclusive custody and control of the minor children, Helen Christine and Robert Gwathmey Merritt, with the privilege of the defendant Robert G. Merritt seeing and having said children at reasonable times during each and every week.

2. That the defendant Robert G. Merritt pay to the plaintiff Helen P. Merritt the sum of One Hundred Dollars (\$100.00) per month as permanent separate maintenance for the support of herself and minor children. Said payments to be made on the 1st day of each month.

3. And it is furthered ordered, that the defendant Robert G. Merritt shall not take said children beyond the jurisdiction of the District of Columbia without the permission of the plaintiff.

4. That the said defendant Robert G. Merritt be and he hereby is permanently restrained from molesting the plaintiff Helen P. Merritt.

WILLIAM HITZ.”

Witness as to both signatures:

ELIZABETH C. READ.

We consent:

HELEN P. MERRITT,
Plaintiff.

ROBERT G. MERRITT,
Defendant.

2. Your petitioner represents to this Honorable
13 Court that the foregoing decree for separate maintenance and custody of the minor children was based and predicated on conditions existing relative to the marital relations of the plaintiff and defendant, as mentioned and set forth in the bill of complaint filed herein by this plaintiff, at said time, reference to which said bill of complaint is hereby made and prayed to be read as a part hereof.

3. That at the time of the entry of said decree, the plaintiff herein was employed at a salary of Fourteen Hundred Dollars (\$1400.) per annum, and the defendant was employed and received a salary of Four Thousand Dollars (\$4000.) per annum, and the parties were living separate and apart, the plaintiff having the custody of the two minor children, Helen Christine, born July 22, 1914, and Robert Gwathmey, born April 6, 1917; that due to many years of inhuman and cruel treatment on the part of her husband, the defendant, Robert G. Merritt, the plaintiff's health at the time of the entry of said decree was seriously impaired, and she was in no fit condition to be employed outside of her home; that within a very short time after the passage of the decree for separate maintenance, the defendant began importuning the plaintiff to come back to him and resume marital relations; he threatened to discontinue the payment of the separate maintenance, and made various other threats and, finally, adopting different tactics, he begged and persuaded the plaintiff to re-establish the home, promising to behave himself and to adequately provide for every need of the plaintiff and the children. As a part of his campaign of winning the forgiveness of the plaintiff and inducing her to become reconciled to him, he took the matter to the Bishop of Washington of the plaintiff's Church, and sought him to intercede and persuade the plaintiff to resume marital relations and thus bring the family together, and finally in July of 1925, upon
the defendant's promise and assurance that he
14 would conduct himself as a true, loyal and devoted husband towards his wife and family, that he would provide adequately for their maintenance and support, that he would never abuse or be cruel to the plaintiff and his children, the plaintiff gave up her employment, condoned the defendant's past offenses, became reconciled,

and resumed with the defendant marital relations. The defendant subsequent thereto purchased a home, No. 26 West Washington Street, in the town of Kensington, Maryland, where the parties moved and resumed their interrupted married life. On June 17, 1927, another child was born to the parties, Elise Wickes, which child, together with the other two children, are now in the plaintiff's custody.

4. That very shortly after the resumption of the marital relations, the conduct of the defendant, which had twice before broken up the home, gradually resumed and reasserted itself. The defendant on numerous occasions, without any provocation whatever, burst into tirades of abuse and foul and obscene language in the presence of the plaintiff and their minor children, he talked of killing persons by poison and other means. Before the birth of the youngest child, he often told the two older children, then aged ten and thirteen years, respectively, that "my one hope is that your mother will die when the baby is born"; he often, before the birth of the youngest child, told the plaintiff to "get out", and threatened bodily harm to the plaintiff if she did not go; many times he threatened to kill the plaintiff and said he was going to "wipe out the whole family"; he threatened many times to maim and torture the plaintiff; on many occasions, he used physical violence against the plaintiff, striking her and making threats to kill her, which conduct aroused such a commotion in the house as to attract the attention of neighbors; he often spoke of his affection for other women, and frequently accused the plaintiff of being untrue
15 to him; that the said defendant, on several occasions, when out driving in an automobile with his family, suddenly became angered at some fancied or imagined grievance, and drove his automobile in the most reckless fashion, threatening to ditch it or run into something, thereby bringing great fear of bodily harm or death to the plaintiff and their children; that the defendant is a man of keen intellect and education, and does, at times, when it suits him to do so, exhibit traits of refinement, but on other occasions, he relapses into a beast of the most unreasonable, vulgar and dangerous type. The defendant has lived a sort of Dr. Jekyll and Mr. Hyde ex-

istence, during all this time, carrying an attitude of respectability among those of his acquaintance, outside of the home, but within the home, displaying attributes of the kind hereinbefore described; the plaintiff and her children have lived in mortal terror and fear of the defendant, until the health of the plaintiff and their two old children has become seriously impaired, and the plaintiff, at this time, is sick and hardly able to attend to her household duties; this condition of affairs existed continuously until about the 4th day of February, 1930, when the defendant returned from his office one evening, exhibiting signs of mental excitement and acting in a very queer manner; he locked the doors and windows, went to the cellar and cut the telephone wires, all the while exhibiting threats of something dire to happen. He had often exhibited a pistol, threatening to use it, and on the occasion last mentioned, he carried something under his coat closely resembling a pistol in shape. His actions and manner and threats became so menacing that the plaintiff finally escaped from the house, and called in help. A police officer was summoned from Rockville, Maryland, and the defendant was arrested charged with threats, and said case is now
16 pending in the town of Rockville; as a result of this last outbreak on the part of the defendant, the home was again broken up. The defendant has not lived with the plaintiff since said date, and the plaintiff is advised that he is now residing in the City of Washington, but his address is unknown to the plaintiff.

5. That since the entry of the decree for separate maintenance, hereinbefore referred to, the defendant has paid to the plaintiff practically nothing on account of the separate maintenance decreed to be paid; he has held on to the purse strings, refusing to give the plaintiff any regular allowance, but merely doling out to her in small dribblets from time to time barely sufficient for her personal needs. He has refused to allow the plaintiff to incur any bills for clothing, food and other necessities, and on several occasions, has notified tradesmen not to extend to her any credit; the defendant is employed in the Income Tax Division of the Treasury Department, at Washington, D. C., at a salary of about Forty-Five Hundred Dollars per annum; during all the time aforesaid, he has squandered

his earnings on himself and the pursuit of his own happiness; he has been extravagant and incurred many bills on his own account; after the defendant took up his residence in Washington, he notified the plaintiff that he would send her Twenty Dollars (\$20) per week "to purchase provisions and supply actual necessities" for the plaintiff and the children, explaining that he was obliged to reduce all of his expenses to the absolute minimum "in order that I may have sufficient finances to protect myself in any action contemplated by you." Since that time, February 20, 1930, the defendant has sent to the plaintiff at irregular intervals, amounts equivalent to about Twenty Dollars per week, which is all the income the plaintiff has had to defray expenses of her household, and to take care of herself and her three minor children; the defendant has failed to make payments of first trust interest on the home, amounting to about One Hundred Fifty Dollars (\$150), and is over three months in arrears on the payments on the second trust on said home, amounting to One Hundred Fifty Dollars (\$150), and the plaintiff has been advised by the holders of these trusts that the property will be foreclosed and sold on April 1, 1930, at which time she will be required to move out of the home and seek shelter elsewhere; the defendant has advertised the property for sale through an agent in Kensington, Maryland; the plaintiff has been without sufficient means to adequately run the household, and has been the recipient of the charity of neighbors for coal and other necessities; bills which the defendant claimed he had paid have been coming to the house, one of them a milk bill of over Sixty Dollars (\$60), past due since February 21, 1929; the defendant placed their eldest child in a private school, where she is now attending, but by reason of his non-payment of her tuition, the plaintiff will be obliged to withdraw said child from said school, thereby depriving the child of the opportunity to complete her education; the plaintiff, although without means to pay for services, has had the help of attorneys and a Welfare Association in Rockville, who tried to effect a settlement of monetary affairs between the plaintiff and the defendant, but the defendant has thus far failed and refused to make any further payments, or agree to make

any further payments, except the amounts which he has sent to the plaintiff, as hereinbefore stated, and which sums have not approximated the amount specified in the decree for maintenance, hereinabove referred to, he, the said defendant, insisting that he will not pay more unless he is allowed to visit the children and have them in his custody and control for certain periods each week, to which proposition this plaintiff has refused to accede, for the reason that she fears for the safety of said children while in the custody and care of said defendant, and for the further reason that said children are afraid of the defendant, and refuse to see him; failing in securing adequate provision for separate maintenance and support in the negotiations, through her Rockville attorney, this plaintiff has been forced to seek the advice and counsel of an attorney in Washington, who has advised her that this Honorable Court has jurisdiction to modify the decree, passed herein, to meet the present situation of the parties hereto; this plaintiff further represents to the Court that, although sick and unable to work, and having three children to care for, one of them an infant of tender years, she, nevertheless, has been and is seeking employment, but so far, without success, and that she is faced with the immediate necessity of moving her household goods to another home, and she has no money with which to pay the cost of moving or to advance the first month's rent in a new home, nor has she the means to pay for the rental of another home; she is furthermore without means to pay court costs and attorney's fees; she further represents to the Court that the sum of Twenty Dollars per *month* is not sufficient to pay for the food, clothing, doctor bills, and other necessities required by her and the children, and she furthermore represents to the Court that the sum of One Hundred Dollars per month, fixed in the decree for maintenance, is inadequate and disproportionate in view of the fact that the plaintiff is not employed, in view of the fact that there are three children now, instead of two, and in view of the further fact that the defendant is making more salary now than he did when said decree was passed, and the plaintiff is advised that this Honorable Court has the power to order the defendant to pay court costs and coun-

sel fees of this proceeding, and to modify the decree heretofore passed herein, so as to allow this plaintiff an adequate and just sum for the maintenance and support of herself and said three minor children, now in her custody and control.

19 6. The plaintiff says that the defendant has threatened to leave the jurisdiction, has threatened to take her children away from her, and has annoyed the plaintiff by repeatedly calling up on the telephone, and sending messages, demanding the right to see and have the custody of said children; plaintiff avers that the safety and welfare of the children will be jeopardized if the defendant is allowed to see or have their custody and control for any length of time whatever, and she is advised that this Honorable Court has the power to revise and modify the said decree, insofar as the custody of the children is concerned, by including therein the custody to the plaintiff of the youngest child, Elise Wickes and by providing that the defendant shall not have the custody and control of any of said children for any length of time.

7. This plaintiff says that when she condoned the past offenses of the defendant, and consented to and did live with him again, it was upon his expressed promise to demean himself as a good, true, loyal, kind and affectionate husband and father, to desist from his cruel treatment and abuse of the plaintiff and said children, and to adequately provide for their maintenance and support, all of which promises the defendant flagrantly violated, and which brought about the separation of the parties, and the plaintiff is advised that this Honorable Court has the power to require said defendant to pay to the plaintiff such amount under said decree for maintenance as will be just and proper at this time, considering the circumstances of the parties and the necessities of the plaintiff and her children, and that this Court has the further power, not only to award to her and require payment by the defendant of maintenance money due under said decree, as it now stands, but that this Court has the further power to modify said
20 decree and to increase the amount to be paid to the plaintiff in the future for the maintenance of herself and children.

The premises considered, your petitioner prays:

(1) That an order may be passed herein, requiring the defendant to show cause as follows:

(a.) Why he should not be assessed and required to pay by appropriate order of this Court a lump sum for maintenance and support, under the decree passed herein on the 5th day of June, 1925, as it now stands.

(b.) Why said decree should not be modified by the allowance to the plaintiff of a larger sum, by way of maintenance and support for the future for herself and minor children.

(c.) Why the custody of said youngest child should not be given to the plaintiff.

(d.) Why said decree, passed herein on the 5th day of June, 1925, should not be modified so as to prevent and enjoin the defendant from having the custody and control of said children at any time.

(2) That an order may be passed herein, requiring the defendant to pay to the plaintiff a lump sum for maintenance and support, under the decree passed herein on the 5th day of June, 1925, as it now stands; that an allowance may be made to the plaintiff of a larger sum, by way of maintenance and support for the future for herself and minor children; that the custody of said youngest child may be given to the plaintiff; that said decree, passed herein on the 5th day of June, 1925, may be modified so as to prevent and enjoin the defendant from having the custody and control of said children at any time.

(3) That an order may be passed herein, requiring the defendant forthwith to pay the costs of this proceeding and reasonable counsel fees.

21 (4) That an order may be passed herein, requiring the defendant to give bond to abide by and perform such decree as may be passed herein, regarding the payment of maintenance money and counsel fees, and requiring the defendant to remain in the District of Columbia, pending these proceedings.

(5) And for such other and further relief as the nature of the case may require.

HELEN P. MERRITT.

DISTRICT OF COLUMBIA, ss:

Helen P. Merritt, being first duly sworn on oath deposes and says that she has read the foregoing petition, by her subscribed, and knows the contents thereof; that the facts therein stated this affiant verily believes to be true.

HELEN P. MERRITT.

Subscribed and sworn to before me, the undersigned Notary Public, in and for the District of Columbia, this the 29 day of March, 1930.

[NOTARIAL SEAL.]

JENNIE O. BERLINER.

Notary Public, D. C.

GEORGE C. SHINN,
Attorney.

22 *Answer to Petition to Modify Decree, for Custody of Children and Maintenance, and Rule to Show Cause Issued Thereon.*

Filed Apr. 4, 1930.

The answer of Robert G. Merritt to the petition filed on behalf of the plaintiff in the above entitled cause, to modify the certain decree entered in the above entitled matter on June 5, 1925, and the rule to show cause issued thereon, respectfully shows to the Court as follows:

1-3. Defendant admits the entry of the decree set forth in the petition. Defendant denies that at the time said decree was signed he was receiving a salary of \$4,000 per year, and states the true fact to be that his employment on which said decree was predicated, did not begin until June 9, 1925, and was at a salary of \$5,000 per year. He emphatically denies that at the time said decree was signed plaintiff's health had been seriously impaired and avers that the true fact is that plaintiff had become tired of office work, wanted to resign her position, and so informed the defendant. He avers plaintiff also advised him that she did not want the above entitled cause to be tried in open Court and that if he would sign a consent decree, and buy a house in the suburbs of the city, she would become reconciled to him again and their home could be re-established. Defendant emphatically denies that he importuned the

23 plaintiff to return to him after the entry of said decree, or that he threatened to discontinue payment of separate maintenance, and he avers it was at the request of the plaintiff that the parties hereto became reconciled and cohabited again together. Defendant denies that as a measure to induce the plaintiff to return to him he took the matter up with the Bishop of Washington, as in plaintiff's petition alleged, and avers that what plaintiff had in mind in making such an allegation in her petition was on the occasion when she deserted the defendant in 1924, when the son of a Minister of their faith acted as her adviser. He emphatically denies that he promised reformation or that he would cease being cruel or abusive to the plaintiff, and says there was never any basis or foundation for such a promise because defendant had not been cruel to the plaintiff, which fact she well knew. He avers that upon their reconciliation the home in Kensington, Maryland was purchased in July, 1925, and the parties hereto lived and cohabited there until the first week in February, 1930. He avers that the three children are in the plaintiff's custody solely because, following the hearing of charges against defendant in Rockville, Maryland February 8, 1930, defendant was restrained from going to Kensington, interfering or molesting the plaintiff. Defendant avers that a hearing was held against him on the charge that he was mentally incompetent, which charge was and is without any foundation in fact whatsoever. Defendant avers that while he was cautioned against going near the plaintiff at their home, he was nevertheless not restrained from seeing his children at any time or place, and avers that, regardless of this fact, he has not been able to see them since he was taken into custody at the instigation of plaintiff the first week in February, 1930. Defendant has visited the Eastman School, 17th and Massachusetts Avenue, N. W. to see Christine, his oldest child, and on each occasion the child has refused to see the defendant, sending word that he understood from the plaintiff she was not supposed to see her father. In this connection, plaintiff communicated with the police authorities at Rockville in the hope of having them intercede to restrain the plaintiff from attempting to see his child at the school.

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4. Defendant emphatically and positively denies the allegations of cruelty mentioned in the fourth paragraph of the petition. He avers the plaintiff is exceedingly nervous and particularly vindictive, and has nagged incessantly at the defendant, and is possessed of an ungovernable temper. Defendant emphatically denies a statement therein attributed to him with reference to the birth of his youngest child. He denies that he ever threatened to kill the plaintiff or that he would torture her or maim her, or injure anyone else in the family. He emphatically denies that he ever used physical violence against her, or that he struck her or made threats to kill her, and if the attention of neighbors has ever been attracted to arguments that have taken place in his home, defendant is yet to know about it. Defendant denies that he spoke to the plaintiff, or to anyone else, about his affection for other women, or that he frequently accused the plaintiff of being untrue to him. He further denies that he became angered while driving his automobile and threatened to wreck the machine. He further emphatically and positively denies other allegations preferred against him in said paragraph with reference to cruelty or his leading a "Doctor Jekyll and Mr. Hyde existence". In this connection he avers that practically from the time the parties hereto became reconciled until the defendant was arrested on false charges February 6, 1930, the plaintiff herein followed a shrewd and carefully planned policy of nagging and provocation against the defendant, rendering happiness together impossible and cohabitation intolerable. Plaintiff consulted psychiatrists two years ago as to the best means to have the defendant committed to an asylum. She has employed social workers to harrass and plague the defendant on the subject of insanity, and has told a number of persons that defendant is of unsound mind and has dangerous tendencies. He denies that plaintiff and their children have lived in mortal terror and fear of the defendant, or that their health has been impaired by reason of such a fear, or that plaintiff is sick and unable to attend her household duties. With reference to the incident of February 4, 1930, which the plaintiff undertakes to describe in her petition, the defendant says the true facts relating thereto are as follows: Attorney T. L. Dawson of Rockville called defendant on the telephone in his office and

stated that the plaintiff had consulted him with reference to domestic troubles, inviting the defendant to come to Rockville to talk with him about it. In view of his past experience with the plaintiff, defendant suspected that plaintiff was in the process of instituting a suit of some kind against him, and accordingly defendant made an engagement to visit the attorney that evening, which he did not intend to keep. That plaintiff was present in the home that evening, and after dinner when defendant went to a nearby store to purchase tobacco, he was followed home by a police officer, to whom the plaintiff had aired her grievances several days before, and while defendant was in his own home, the officer approached the house and, on the statement of plaintiff that defendant was armed, arrested defendant and took him to the Rockville jail. Defendant avers there was no disturbance in his home that evening, no commotion or argument of any kind, he was not armed, and had no intention of harming anyone. That defendant was committed to the jail at Rockville and kept locked up for two days and two nights before he was allowed to make bail. He was required to give bail in the sum of \$1,000 and is now awaiting trial in Rockville on charges of assault and battery, which charges were preferred by plaintiff and which are without foundation. Defendant admits that he has not lived with the plaintiff since February 5, 1930 and he avers that he is now residing in Alexandria, Virginia, which is the farthest point away from the plaintiff that he can get and still
26 attend to his daily work in Washington at the Bureau of Internal Revenue, where he is employed as a valuation engineer.

5. For answer to the fifth paragraph of the petition defendant says that every dollar of his salary received between July, 1925 and February, 1930, was spent by defendant on his home and for the comfort and support of plaintiff and their children. That on account of plaintiff's extravagant habits, defendant was forced into debt and now owes bills for ordinary expenses amounting to \$1,648.68. That there is appended hereto an exhibit marked "Defendant's Exhibit No. 1", which contains a list of defendant's present debts, defendant praying that said list be considered as a part of this answer. That he is obliged to pay off these obligations at the rate of \$150.00 per month. Defend-

ant avers that the only time since 1925 that he has notified tradesmen not to extend credit to anyone but himself was an occasion when the plaintiff persisted in running up extra bills at an expensive store which were wholly unnecessary and which defendant found it most difficult to pay. He denies that he has squandered his earnings on himself. He has not been able to purchase a suit of clothes for three years and the shoes which he now has are more than two years old. Defendant's present salary is \$4,600 per year. Plaintiff was particularly bitter and scathing in her arraignment of the defendant when his salary was reduced on January 1st, 1926 to \$3,800 per year. She appeared dissatisfied in the home and was constantly nagging the defendant about different matters, all of which made him nervous and ill. Defendant has on many occasions, responding to the extravagant requests of the plaintiff, purchased clothes for her and the children far beyond his means to provide, including a fur coat for the plaintiff herself. When defendant was thus forced from his home, facing debt and being deprived of the companionship of his children, he nevertheless managed to send the plaintiff \$20.00 per week, at the same time requesting the coal mer-

chant in Kensington, M. L. Hendry, to provide a
27 sufficient quantity of fuel at all times for the house in which plaintiff lives. That while it is true the trustees will probably foreclose on the Kensington property, due to default having been unavoidably made in the payments, it will be at least sixty days or perhaps three months before such action takes place, and plaintiff is thus occupying the premises without rent and her only expense is food and clothing. Defendant has continued to make his payments of \$20.00 per week to plaintiff and on March 31st sent the sum of \$20.00 by money order to her, which was for the week ending March 28, 1930, and that he will continue to provide for plaintiff and his children, although now debarred from seeing them, to the best of his ability. Defendant avers that plaintiff's recent unjustified and unwarranted act in causing the defendant's arrest, was a most expensive incident to him and he is and has been, unable to make the payments for either the first trust interests or the second trust curtailments on their property. He denies that plaintiff will be compelled to vacate the property in April, and is advised that she probably may occupy same

through June and possibly July, 1930. Answering the allegation that the defendant has advertised the property for sale through a real estate agent in Kensington, defendant says that an agent named Chamberlain visited defendant in his office in the District and said that the plaintiff had called him up and told him she wanted to sell the house and asked the agent if he would communicate with defendant and see if the defendant were willing to sell it. That she further requested the agent to put a "For Sale" sign on the property if defendant would give his permission. Defendant advised the agent that he was willing to sell the property if the plaintiff so desired, but to date no sale has been effected. Defendant avers plaintiff has had sufficient means to adequately support herself and the children and denies that it has been necessary for her to receive charity from neighbors, and in this connection defendant refers again to his order to the coal dealer to keep the house supplied with fuel. Due to the fact that defendant's

28 oldest daughter has refused to see him on two occasions when he called at the private school which she is attending, he communicated with the principal of the school and advised her that unless his daughter felt she could see her father, he would not be disposed to continue paying her expenses at a private institution. For answer to the allegation that plaintiff has had no means to pay for legal services and has received help from a welfare association in Rockville, defendant avers that there was never any justifiable reason for her engaging the services of such persons and the attempted settlement of their financial differences mentioned in the petition had to do with the submission to the defendant of a property settlement agreement which called for the payment to her of \$2,184.00 annually and the presentation of this document was accompanied by the threat that unless the defendant would execute the same they would take steps to commit him to an asylum for mental incompetency. Defendant flatly refused to become a party to such an agreement. In this connection defendant denies the assertion that he would not make a greater allowance to the plaintiff unless she would arrange for him to have the custody of the children at certain times, but he believes that he is in all respects a fit and proper person to have the custody of the said children. He avers that the true reason why the plaintiff has refused to permit the

children to see him is that she is intent upon persecuting him to the fullest possible extent. Defendant avers that the plaintiff has from time to time endeavored to poison the minds of these children against the defendant. Because of her domination over them, they are in fear of her instead of the defendant. Defendant denies that he is earning more money now than was the case when the decree was entered, and avers that said decree was drawn with the view of the defendant's receiving a salary of \$5,000 a year.

6. Defendant emphatically denies that he has threatened to leave the jurisdiction or has threatened to take the
29 children away with him, or has annoyed the plaintiff by calling her on the phone or by sending messages to the plaintiff relative to the children. On one occasion when defendant communicated with the plaintiff following his release from the Rockville Jail, he told her that he was carrying \$30,000 life insurance, to which plaintiff and the children are beneficiaries, and that if she persisted in causing him additional expenses, it would be physically impossible for him to continue to pay the premiums on this insurance. For answer to the allegation that plaintiff is not able to become employed, defendant avers that she is a trained office assistant and on the two occasions heretofore when she deserted this defendant, she secured good positions, once with the U. S. Chamber of Commerce, when she was secretary to Mr. Elliot C. Goodwin, its resident vice-president. When defendant protested against plaintiff's continuing in a course of conduct which would necessarily greatly increase his expenses, she replied that she knew that defendant was perfectly sincere in what he said, but that she had received the advise of leading mental experts and it was to the effect that defendant would have to be treated in an institution before he could return to his home. Defendant emphatically denies that he has needed, or does need, any such treatment.

7. Defendant again avers it was at the request of the plaintiff that they took up their household life again and defendant denies he ever requested the plaintiff to forgive him for past offenses, for the reason that he has at no time treated plaintiff or their children with cruelty or shown them any lack of consideration, and he is advised that by

virtue of this case having become moot by the reconciliation of the parties, she is not entitled to have the decree herein amended or modified in the respect indicated. And for answer to so much of the petition as seeks to require the defendant to make a lump sum payment of the arrears of maintenance accruing under its orders, defendant
30 avers that he has more than contributed to the plaintiff and their children the amount called for by the terms of said decree. Defendant avers that he has no funds or property and no income other than his salary, and he is absolutely unable to give security or bond to provide by and perform such order as may be entered herein, but he assures the Court that if any order is made herein he will perform the same to the utmost of his ability.

Wherefore, having fully answered said petition and the rule issued thereon, this defendant prays that upon hearing the same may be dismissed and the proceeding stricken from the dockets, and that he may be awarded such further relief as the nature of the case may require and to the Court may seem proper.

ROBERT G. MERRITT,
Defendant.

RAYMOND NEUDECKER,
Columbian Bldg., Wash., D. C.
Attorney for Defendant.

DISTRICT OF COLUMBIA, ss:

Robert G. Merritt, being first duly sworn, according to law deposes and says; that he has read the foregoing answer by him subscribed and knows the contents thereof; that the matters and things therein stated as of his personal knowledge are true, and those based upon information and belief, he believes to be true.

ROBERT G. MERRITT,
Defendant.

Subscribed and sworn to before me this 3rd day of April,
A. D., 1930.

[NOTARIAL SEAL.]

WILLIAM C. ASHFORD,
Notary Public, D. C.

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DEFENDANT'S EXHIBIT No. 1.

Debts of R. G. Merritt as of April 4, 1930.

	Amount I owe.	Remarks.
American Ice Co.	\$10.26	
W. C. Black	65.00	(Note due May 10, 1930.)
Dr. W. Sinclair Bowen ..	75.00	(% birth of baby in 1928.)
Dr. Hugh B. Callahan		(Mrs. Merritt \$50.00)
(Dentist)	65.00	(Christine 9.00)
		(Robert, Jr. 6.00)
Chesapeake & Potomac		
Telephone Co.	4.27	
Chestnut Farms Dairy ..	60.42	
Mary Park Clements	41.70	(Violin instr. for Jr.)
Dr. Wm. T. Davis	25.00	(For treating Jr.'s eye.)
Dr. M. M. Dolmage (den-		
tist)	10.00	(% Mrs. Merritt.)
Eastman School	86.20	(% Christine.)
Emergency Hospital	25.00	(% Mrs. Merritt's foot.)
Dr. A. B. Graesle (den-		
tist)	6.00	(% Mrs. Merritt.)
Green Mount Cemetery,		
Baltimore	5.00	(For care of lot.)
Drs. Groover, Christie &		
Merritt	20.00	(X-ray, Mrs. Merritt's foot.)
Harris & Ewing	32.00	(Photos, Christine.)
Hecht Co.	32.70	(Furniture.)
Hendley-Kaspar School..	54.30	(Piano lessons for Christine.)
M. L. Hendry	35.50	(Coal.)
W. S. Herman	15.00	(Jr.'s violin.)
Hill & Tibbitts	30.00	(1923 Ford.)
Home Life Insurance Co..	55.50	(Insurance note due Apr. 7, 1930.)
J. W. Hopkins	50.30	(Grocery bill.)
House & Herrman	17.00	(Furniture.)
Hub Furniture Co.	19.50	(Furniture.)
Dr. Eugene Jones	35.00	(Self & family.)
Kensington Bank	15.50	(Note for money borrowed.)
Amount forward ..	\$891.15	
32 Amount forward ..	891.15	
Lansburgh & Bros.	61.50	(Elec. sewing machine.)
R. G. Merritt, Jr.	96.25	(Money borrowed.)
Dr. Wm. D. Monroe, Jr.		
(dentist)	7.00	(% Jr.)
Montgomery Press	2.00	
Mutual Benefit Life Ins.		
Co.	125.00	(Ins. note due Apr. 10, 1930.)
Okay Radio Co.	68.20	(Radio.)
Potomac Electric Appli-		
ance Co.	3.00	(Repairing waffle iron.)
Dr. Elliott C. Schutz....	14.00	(Christine's foot.)
St. Paul's Cemetery	3.00	(Care of lot.)
Semmes & Semmes	190.00	(Patent attorneys.)
Soc. Reg. Assn.	7.00	
J. H. Snyder.....	5.00	(Money borrowed.)
Society of American For-		
esters	10.00	(1930 dues.)
Southern Lumberman ...	43.75	(Advertising.)
Eugene B. Sullivan	10.00	(Legal services.)
Talbott & Prettyman ...	46.90	(" ")
Union Trust Co.	5.75	(Bal. due for safe dep. box.)

	Amount I owe.	Remarks.
United Veterans of In-		
come Tax Unit	1.00	(1930 dues.)
Valley Oil Co.	17.98	($\frac{1}{2}$ bbl. auto oil.)
Veterans Bureau	10.50	(War Risk Insurance.)
W. A. Wagner	14.85	(Plumbing.)
Wash. Suburb. San. Com.	2.00	(Water bill.)
Young Men's Shop	12.85	(% overcoat for self.)
Total	\$1.648.68*	

33 *Reply of Plaintiff to the Answer Filed by the Defendant to the Petition to Modify Decree for Custody of Children and Maintenance.*

Filed Apr. 11, 1930.

The reply of the plaintiff, Helen P. Merritt, to the answer filed by the defendant, Robert G. Merritt, to the petition to modify decree for custody of children and maintenance, respectfully shows to the Court as follows:

1-3. Answering the paragraph numbered by the defendant 1-3, the plaintiff denies that she advised the defendant that she did not want the above entitled cause to be tried in open Court, and she denies that there was any understanding or agreement between the parties to the effect that if he, the defendant, would sign a consent decree and buy a house in the suburbs of the City, that she would become reconciled to him again, and re-establish the home; this plaintiff says that what actually happened was that the consent decree was signed by this Honorable Court, and four months subsequent thereto, the defendant opened negotiations for a reconciliation, as set forth in the plaintiff's petition filed herein; further answering said paragraph, this plaintiff says that by reason of the defendant's conduct in the home, and the threats he had previously made, on the occasion when he was arrested and taken to Rockville, he was warned by the Police officials and attorneys to stay away from Kensington, and to desist in molesting or interfering with the plaintiff in any manner, and to this extent plaintiff says he was restrained

34 from coming to see the plaintiff or the children; this plaintiff denies that there was any hearing held against the defendant on the charge that he was mentally

*This does not include lawyers' bills for pending litigation, including bill of Attorney Stedman Prescott of Rockville.

incompetent, but on the contrary, says that the defendant himself voluntarily submitted to medical examination, being accompanied for that purpose by his own attorney; the defendant's irrational conduct gave rise to the suggestion that he was suffering from some mental or nervous derangement, which might require treatment; the defendant, however, left the jurisdiction, and nothing ever came of the matter; while this plaintiff has personally not influenced the children in the matter of their seeing the father, this plaintiff believes that it is dangerous for the father to see said children or have their custody, as stated in the petition filed herein, and she furthermore says that said children, uninfluenced by this plaintiff, have voluntarily refused to see said father, for the reason that they are afraid of him, and the plaintiff furthermore represents to the Court that the Police authorities of Montgomery County sent word to the school in the District, where the boy attends, advising the officials of the said school not to let the father see the child.

4. In replying to paragraph four of the defendant's answer, this plaintiff denies that she is exceedingly nervous, or vindictive, and denies that she has nagged the defendant in any manner whatever, and she furthermore denies that she is possessed of an ungovernable temper. On the contrary, this plaintiff says that she has endured patiently for seventeen years, with a few interruptions, a life of torture, endeavoring to please, placate, mollify, and live with the defendant, an irrational, unreasonable, temperamental, and erratic personage, to say nothing of many other qualities possessed by him, some of which are mentioned in the

original petition filed herein by the plaintiff; this
35 plaintiff further denies that she has followed "a shrewd and carefully planned policy of nagging and provocation against the defendant," as alleged in said paragraph four of the defendant's answer; she admits that she did consult a psychiatrist several years ago, but not for the purpose of having the defendant committed to an asylum. It was in an effort to ascertain the cause of the defendant's erratic behaviour and to find out if it were possible for the defendant to be treated therefor. The immediate occasion for the plaintiff's visit to the psychiatrist was that the defendant brought home with him a bottle of poison, and was threatening to kill someone with it. This

plaintiff denies that she has employed social workers to harass and plague the defendant on any subject. On the contrary, the conduct of the defendant at various times excited the attention of neighbors, which neighbors interceded on behalf of this plaintiff with welfare organizations, and this plaintiff knew nothing about the welfare organizations interesting themselves in her domestic affairs until they called to see her; this plaintiff denies all of the allegations of the defendant in paragraph four, relative to the incident of February 4, 1930, and how the same arose, but says that the said incident of February 4, 1930, resulting in the arrest of the defendant, occurred and happened exactly as the plaintiff has set forth in her original petition filed herein.

5. Answering paragraph five, this plaintiff denies that the defendant has spent every dollar of his salary between July, 1925, and February, 1930, for the comfort and support of the plaintiff and their children; this plaintiff says that the defendant has been most parsimonious in financial affairs during all of said time, never giving the plaintiff any regular allowances of money, but doling out small amounts at infrequent intervals; that he personally attended to the purchase of all household necessities; that he was very extravagant in his ideas about his own comfort and

36 expended his earnings largely on himself; that the plaintiff never incurred any bills whatever for herself or children, and none for the household with but one exception, when she was authorized by the defendant to buy small quantities of groceries from a nearby grocery store, this authority being given by the defendant to the plaintiff and exercised by the plaintiff for a short period of about two weeks at a time; these periods, when the plaintiff was allowed to make small purchases at the grocery store, occurred when the defendant was out of ready money; this plaintiff says, relative to the debts amounting to \$1648.68, listed by the defendant, that said alleged bills ought not in a court of equity and conscience deprive this plaintiff and her minor children of the necessities of life, especially when it is borne in mind that the defendant has always been in debt from the time of the marriage of these parties, and long before, and this plaintiff says that many of the bills listed by the defendant are barred by the Stat-

ute of Limitations, and, furthermore, that the defendant has deceived the plaintiff all of these years as to many of the bills, claiming that he had paid them, when, as a matter of fact, he had been using the money for his own purposes; the plaintiff furthermore represents to the Court that she has been advised, and on information and belief avers, that the defendant has made no payments on many of the bills listed by him at all. On others he has made but very few payments in the past few years, and the only bills on which he has consistently made any payments have been the following, on which very small monthly payments have been made from time to time: Hecht & Co., \$32.70, being balance of a five-year old bill; House & Herrmann, balance \$17.00 from a five-year old bill; Hub Furniture Company, balance of \$19.50 on a five-year old bill; Lansburgh & Bro., balance of \$61.50, on the purchase of a sewing machine, which machine, however, the defendant has requested Lansburgh & Bro. to repossess and turn over to him, the defendant, although the plaintiff's own machine was turned in at the time of the purchase of the new sewing machine as part payment. This plaintiff further represents to the Court

37 that some of the bills listed by the defendant are items for his own pleasure and comfort, such as Hill & Tibbetts, \$30.00, being balance due on an old Ford machine, purchased by the defendant from Hill & Tibbetts about a year ago; item of Okay Radio Company, \$68.20, radio purchased by the defendant for his own benefit and over the protest of the plaintiff; the item of \$190.00, listed by the defendant as one of his debts, is a bill two or three years old, due by the defendant to a firm of patent attorneys, which bill the defendant represented to this plaintiff had long since been paid out of moneys which he borrowed for the purpose of paying sundry bills; other items mentioned by the defendant are bills for his own pleasure and purposes, and have been standing for a long period of time, very little, if anything, having been paid in the past year on any of them; the plaintiff says that many of the bills incurred by the defendant were due to his own extravagant notions and whims; for instance, he ordered dancing lessons for the daughter, \$58.00; purchase of a violin for the boy, \$40.00; purchase of a bicycle for the boy, \$43.00; sending boy to camp seven weeks, \$75.00; ukelele, over \$20.00;

repair of an old Grandfather's clock, \$75.00; victrola, \$28.00. These are only samples of bills incurred by the defendant over the plaintiff's objection, because of lack of financial ability to pay them. The plaintiff further says that the defendant usually paid his own bills in cash, charging everything else to the family, and letting the bills run along as best suited him. The plaintiff further denies that she has consistently nagged the defendant, which made the defendant nervous and ill, as alleged in paragraph five. This plaintiff denies that she has ever encouraged or requested the defendant to be extravagant in his purchases of anything. As to the fur coat, mentioned by the defendant in said paragraph five, this was purchased by the defendant

38 for the plaintiff as a birthday gift, and is the only coat he has provided the plaintiff since their marriage seventeen years ago. It is also the same fur coat mentioned by the defendant in his answer filed herein to the plaintiff's petition five years ago. As to the allegation of the defendant in paragraph five, that the plaintiff may occupy the homestead without rent, this plaintiff says that the defendant is stultifying himself in making any such proposition to the Court, and this plaintiff says in connection therewith that the defendant is in arrears on the first trust interest over six months; that he has been indulged by the holders of the second trust, to whom he is in arrears for several months; that the second trust holders have held off foreclosing on the property until the first of April, on representations that the financial affairs between these parties would be adjusted, so that the property could be carried by either this plaintiff or the defendant, and the plaintiff is faced with foreclosure proceedings; the defendant now says to the plaintiff that he intends to do nothing about the homestead, and invites her to stay in the house and force the holders of the second trust to eject her, thereby suffering humiliation, incurring expenses of foreclosure proceedings, and a possible liability against the plaintiff for wrongfully holding said property against the rightful possession of the holders of the second trust; this plaintiff denies that she called up any agent named Chamberlain, or any other real estate broker or agent, and advised or requested them to put a "For Sale" sign on their home, and says that she did not know that a sign was to be put on the property until an agent called to place the

sign; plaintiff denies that she has had sufficient means to adequately support herself and children, as mentioned in paragraph five, for she has no other means of income than the payments made to her by the defendant, and she further represents to the Court that for three weeks after the last separation, the defendant paid her nothing, and
39 she was the recipient of the kindness of neighbors; plaintiff denies that in negotiating a settlement of their marital difficulties, that she or any one representing her, made any threats against the defendant, but that she did ask the defendant, for his own good, to go to some hospital for treatment, which the defendant refused to do. Plaintiff denies that she has dominated the children, or endeavored to poison their minds against the defendant, and she furthermore denies that the children are in fear of her. Plaintiff further says that the defendant in his answer denies that he is earning more money now than he was when the original decree was entered in this cause, and makes the averment that said decree was drawn with the view of the defendant's receiving a salary of Five Thousand Dollars per annum. The plaintiff in reply to said last mentioned averments of the defendant, contents herself with advising this Court that in the answer filed by the defendant, before the decree was passed herein five years ago, the defendant denied that he was employed at a salary of Four Thousand Dollars per annum, and furthermore represented to this Honorable Court that his salary had been Three Hundred Thirty-three Dollars per month, but that he had lost his position and was then without employment.

6. In reply to paragraph six, plaintiff calls the Court's attention to the defendant's denial that he has threatened to leave the jurisdiction, while in another part of his answer, he says he is living in Virginia; further in reply to paragraph six, of the defendant's answer, plaintiff says that the defendant has frequently advised her that no insurance policies are now in existence and have not been in existence for some time, in which the plaintiff is a beneficiary, and the plaintiff prays the Court to require the defendant to discover and make known the number of policies now in force on his life, with the name or names

40 of the beneficiaries, and how much, if anything, has been paid on account of the premiums thereof. This plaintiff further shows to the Court that although she is not in fit condition to work, she has been and still is seeking employment, such employment being necessarily something which will not interfere with her care of the children, one of them being a child about two years of age. As to the defendant's need of medical treatment, plaintiff has nothing to say.

7. As to the allegation that this case has become moot, in paragraph seven of defendant's answer, this plaintiff is advised she need not make any reply; plaintiff denies that the defendant has more than contributed to the plaintiff and their children the amount called for by the terms of said decree. Plaintiff further avers that the defendant is well able to give security on any bond which might be required by this Court. He has furnished security before, and is well able to do so now.

HELEN P. MERRITT.

DISTRICT OF COLUMBIA, ss:

Helen P. Merritt, being first duly sworn on oath deposes and says that she has read the foregoing reply by her subscribed, and knows the contents thereof; that the matters and things therein stated she verily believes to be true.

HELEN P. MERRITT.

Subscribed and sworn to before me, the undersigned Notary Public, in and for the District of Columbia, this the 8th day of April, 1930.

[NOTARIAL SEAL.]

ELLA BAKER,
Notary Public, D. C.

41 *Affidavit of Robert G. Merritt.*

Filed Apr. 11, 1930.

DISTRICT OF COLUMBIA, ss:

Robert G. Merritt, being first duly sworn, according to law deposes and says that he has read the reply of the plaintiff to the answer of defendant to plaintiff's petition for modification of the decree in the above cause, and for answer to that part of the petition in which the plaintiff

sets forth that she is devoting all of her time to the care of the youngest child, defendant says he is reliably advised that plaintiff has placed such child in a kindergarten either in Maryland or the District of Columbia, and therefore is not obliged to give the child her personal care and attention. Defendant emphatically denies he ever threatened to kill anyone with poison, and says the only cause for his bringing poisonous substance into his home was to kill Mexican beetles which had attacked the garden and flowers. He repeats again that he at all times devoted his wages and salary to defraying the necessary expenses of their home, and the reason why defendant has not been able to pay more promptly obligations which he has incurred is because he has not had sufficient money over and above the current expenses of his home with which to curtail these items. The House and Hermann account which the plaintiff says is five years old was incurred in January, 1930 and is on a monthly payment basis. The other items purchased by defendant were obtained, in many instances, as the result of the plaintiff particularly requesting them and she has accepted and is now using the various things about which she now complains. Defendant is advised that the holders of the second trust on their property do not contemplate immediate foreclosure and the home can be occupied by plaintiff and their children until at least July, 1930. With reference to the statement that for three weeks after the last separation the plaintiff was paid nothing, defendant says that every cent of his income was spent paying for bail and legal services at Rockville, which fact plaintiff well knew. Defendant says that their youngest child will be three years old June 17, 1930, this being the same child which plaintiff has put in either a kindergarten or an infant's home.

ROBERT G. MERRITT,
Defendant.

Subscribed and sworn to before me this 10th day of April, A. D. 1930.

[NOTARIAL SEAL.]

MILTON CONN,
Notary Public, D. C.

42 *Order Denying Petition to Modify Decree, etc.*

Filed Apr. 16, 1930.

This matter came on to be heard on the petition of the plaintiff, Helen P. Merritt, to modify the certain decree entered in the above entitled cause on June 5, 1925, the rule to show cause issued thereon against the defendant, Robert G. Merritt, the answer of the defendant to the said petition and rule, the reply of plaintiff to said answer, and the affidavit of defendant, and was duly argued in open Court by counsel; in consideration whereof it is by the Court this 16th day of April, A. D., 1930,

Adjudged and ordered that the petition of the plaintiff to modify the certain decree above referred to be and the same is hereby overruled, and the rule issued thereon be and the same is hereby discharged, and the said decree of June 5, 1925 be and the same is hereby continued in full force and effect.

By the court:

ALFRED A. WHEAT,
Justice.

From the foregoing order, the plaintiff in open Court notes an appeal to the Court of Appeals, and the undertaking for costs on such appeal is hereby fixed at \$100, or a cash deposit of \$50 in lieu thereof.

ALFRED A. WHEAT,
Justice.

43 *Assignment of Errors.*

Filed Apr. 19, 1930.

The plaintiff respectfully assigns the following as errors committed by the Court in its order herein of April 16, 1930:

1. In overruling plaintiff's petition filed March 31, 1930.
2. No ground existed in the exercise of a sound judicial discretion for denying the prayers of plaintiff's said petition.
3. In not treating the averments of plaintiff's said petition as true, and the statements at variance therewith con-

tained in defendant's answer as untrue, in view of plaintiff's insistence upon her right to take evidence upon the controverted matters, and the defendant's submission without evidence.

4. In finally disposing of plaintiff's said petition and denying relief prayed therein, without permitting the taking of evidence subject to cross-examination upon the controverted matters of fact raised by said petition, defendant's answer thereto, plaintiff's reply to said answer, and defendant's affidavit.

5. In denying plaintiff's right to a reasonable increase of maintenance allowance by reason of changed conditions since the decree of June 5, 1925.

6. In denying an award to the plaintiff of the custody of the youngest child.

7. In denying an injunction to prevent the defendant from having the custody or control of the children at any time.

8. In denying an award against defendant of reasonable counsel fees herein for plaintiff and the costs of the proceeding.

44 9. In denying an order against the defendant requiring him to remain in the District of Columbia, and to give bond to protect the plaintiff in obtaining compliance by him with the Court's orders herein.

GEO. C. SHINN,
GEO. E. SULLIVAN,
Attorneys for Plaintiff.

Memorandum.

April 22, 1930.—Undertaking on appeal \$100 approved and filed.

45 *Designation of Record.*

Filed Apr. 22, 1930.

The Clerk will please prepare a transcript of record upon the appeal from the order entered herein April 16, 1930, including in said transcript the following:

1. Bill of complaint filed March 25, 1925.
2. Answer filed April 3, 1925.
3. Decree entered June 5, 1925.

4. Petition filed March 31, 1930, to modify and enforce final decree.
5. Answer filed April 4, 1930, to said petition.
6. Reply of plaintiff filed April 11, 1930, to said answer.
7. Affidavit of defendant filed April 11, 1930.
8. Order of April 16, 1930; appeal noted; undertaking fixed at \$100.
9. Memo of filing and approval of appeal undertaking.
10. Assignment of errors.
11. Memo of date of submission, approval and signing of bill of exceptions.
12. This designation.

GEO. C. SHINN,
GEO. E. SULLIVAN,
Attorneys for Plaintiff.

Memorandum.

April 26, 1930.—Bill of Exceptions submitted, signed and filed.

46 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 45, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 43850 in Equity, wherein Helen P. Merritt is Plaintiff and Robert G. Merritt is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 29th day of April, 1930.

[Seal Supreme Court of the District of Columbia.]

FRANK E. CUNNINGHAM,
Clerk.

47 In the Supreme Court of the District of Columbia,
Holding an Equity Court.

Equity. No. 43850.

HELEN P. MERRITT, Plaintiff,

VS.

ROBERT G. MERRITT, Defendant.

Bill of Exceptions.

Be it remembered that on the 11th day of April, 1930, a hearing was had in the above entitled case, before the Honorable Alfred A. Wheat, one of the Justices of the Supreme Court of the District of Columbia, holding a term for equity business, in the matter of a certain petition filed by the plaintiff on March 31, 1930. At said hearing, counsel for the plaintiff contended that it was not competent for the Court to make any final disposition of said petition without taking of evidence given subject to cross examination upon the controverted matters of fact raised by said petition, defendant's answer thereto, plaintiff's reply to said answer, and defendant's affidavit, which evidence counsel for plaintiff announced readiness to proceed with then or at any other time. The Court overruled said contention, and declined to allow the taking of any evidence subject to cross-examination, to which ruling counsel for plaintiff then and there excepted, and the same was duly entered upon the minutes of the Court.

Be it further remembered that at the time of, and before, the entry of the order herein on April 16, 1930, overruling the aforesaid petition, counsel for plaintiff objected and excepted to any final disposition of the said petition without allowing evidence to be taken subject to cross-examination upon the controverted matters of fact as aforesaid, and such exception was then and there duly entered upon the minutes of the Court.

48 Wherefore, for the purposes of the appeal taken by the plaintiff from the aforesaid order of April 16, 1930, this bill of exceptions has been prepared and is ac-

cordingly signed by the Court this 26th day of April, 1930.

By the Court:

ALFRED A. WHEAT,
Justice.

49 [Endorsed:] No. 43850. Helen P. Merritt, Plaintiff, vs. Robert G. Merritt, Defendant. Bill of Exceptions. Geo. C. Shinn, Geo. E. Sullivan, Woodward Building, Attorneys for Plaintiff.

Endorsed on cover: District of Columbia Supreme Court. No. 5211. Helen P. Merritt, appellant, vs. Robert G. Merritt. Court of Appeals, District of Columbia. Filed May 14, 1930. Henry W. Hodges, Clerk.

COURT OF APPEALS,
DISTRICT OF COLUMBIA
FILED

OCT 10 1930

Henry W. Hodges

CLERK.

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

APRIL TERM, 1930.

No. 5211.

HELEN P. MERRITT, APPELLANT,

vs.

ROBERT G. MERRITT, APPELLEE.

BRIEF FOR APPELLANT.

GEORGE C. SHINN,
GEORGE E. SULLIVAN,
Attorneys for Appellant.

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In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

APRIL TERM, 1930.

No. 5211.

HELEN P. MERRITT, APPELLANT,

vs.

ROBERT G. MERRITT, APPELLEE.

BRIEF FOR APPELLANT.

STATEMENT OF CASE.

On March 25, 1925, the appellant, Helen P. Merritt, as plaintiff, filed a Bill of Complaint against the appellee (defendant below), in Equity cause numbered 43,850 (Record, page 1).

The Bill recited the marriage of the parties on the 29th day of September, 1913, the cohabitation of the parties as man and wife, and the birth of two children, Helen Christine, born July 22, 1914, and Robert Gwathmey, born April 6, 1917 (Record, page 2). The Bill charged cruel and inhuman treatment, insults, and physical violence on the part of the defendant towards the plaintiff, which resulted in the plaintiff being compelled to leave the defendant on the 24th day of March, 1925, taking her two children with her; the Bill also averred that the plaintiff was employed at a salary of Fourteen Hundred Dollars per annum, and that the

defendant was employed, receiving a salary of Four Thousand Dollars per annum. The prayers of the Bill were for a limited divorce, custody of the minor children, permanent maintenance and an injunction against the defendant restraining him from interfering with or molesting the plaintiff and said children (Record, page 4).

The answer of the appellee, Robert G. Merritt, filed April 3, 1925 (Record, page 5), denied ill treatment, and resisted the application for a limited divorce and custody of the children.

On June 5, 1925, a final decree was passed in said cause (Record, page 9), in which said final decree it was adjudged that the appellant, Helen P. Merritt, be awarded permanently the exclusive custody and control of said two minor children, with the privilege of the defendant, Robert G. Merritt, seeing and having said children at reasonable times during each and every week; that the defendant, Robert G. Merritt, pay to the plaintiff, Helen P. Merritt, the sum of One Hundred Dollars per month, as permanent separate maintenance for the support of herself and minor children; that the defendant, Robert G. Merritt, should not take said children beyond the jurisdiction of the District of Columbia, without the permission of the plaintiff, and that the defendant, Robert G. Merritt, be permanently restrained from molesting the plaintiff, Helen P. Merritt (Record, pages 9 and 10).

On March 31, 1930, the appellant, Helen P. Merritt, as plaintiff in said cause, filed a petition to modify the decree of June 5, 1925 (Record, page 10). The petition recited the previous proceedings, including the final decree referred to, and set forth, in substance, the following: That following the final decree of June 5, 1925, the plaintiff, at the instance of the defendant, and upon his promise to correct his behavior, became

reconciled and resumed marital relations with the said defendant; that the defendant violated the express terms and conditions of the reconciliation and condonement, and shortly after the resumption of marital relations he began again his conduct of abuse, cruelty, neglect, inadequate support, threats to kill, and other forms of misconduct, as mentioned and set forth in said petition; that on the 4th day of February, 1930, the defendant returned from his office in the evening, showed signs of mental excitement, acted in a very queer manner, and exhibited threats of something dire to happen. His actions, manner and threats became so menacing that the plaintiff escaped from the house and called in help; the defendant was arrested and taken to Rockville, Maryland, under charges of threats; that this last episode resulted in the necessary and continuing separation of the parties; that a third child had been born to the couple on June 17, 1927, named Elise Wickes, and that the said last mentioned child was with the plaintiff, as were the other two children; the petition also alleged that the plaintiff was out of employment, depending entirely upon the defendant for maintenance and support for herself and children; that the defendant had not paid any moneys to the plaintiff on account of the decree passed June 5, 1925, and was then allowing her but Twenty Dollars per week for the support of herself and three children, a sum which was entirely inadequate for the purpose; that the defendant was employed at the Income Tax Division of the Treasury Department, at Washington, D. C., at a salary of Forty-five Hundred Dollars per annum; that the home in which she and the children were living was about to be foreclosed and she had no money to pay for moving, or for paying the rent of another home; that the defendant was demanding the custody of the children, and threatening to leave the

jurisdiction and take said children away with him; that the defendant was not a fit person to have the custody and control of the children for any length of time, and that it would be detrimental to allow said children to be in the defendant's custody and control; the petition also set forth that the defendant was annoying and molesting the plaintiff, and making threats against her. The petition prayed, among other things, for an order requiring the defendant to pay the plaintiff a lump sum for accrued maintenance and support, under the decree passed therein on the 5th day of June, 1925, as it then stood; that an allowance be made to the plaintiff of a larger sum by way of maintenance and support for the future for herself and minor children; that the custody of the youngest child be given to the plaintiff; that the decree of June 5, 1925, be modified so as to prevent and enjoin the defendant from having the custody and control of said children at any time; that the defendant be required to pay forthwith the costs of the proceedings and reasonable counsel fees, and that an order be passed requiring the defendant to give bond to abide by and perform such decree as might be passed in said cause, regarding the payment of maintenance money and counsel fees, and requiring the defendant to remain in the District of Columbia pending said proceedings (Record, page 18).

To the petition of the plaintiff, the defendant, Robert G. Merritt, filed an Answer on April 4, 1930 (Record, page 19). Said Answer contained a denial of the salient allegations of the plaintiff's last mentioned petition, as to cruelty, neglect, assaults, threats, inadequate support, and other misconduct, and charged the plaintiff with being nervous, vindictive, and given to nagging the defendant; also charged the plaintiff with having an ungovernable temper, with being extravagant and with being the cause of his running into debt; said

Answer denied that the defendant was not fit to have the custody and control of the children, denied that he had threatened to leave the jurisdiction and take the children away with him, and asserted that the allowance of Twenty Dollars per week which he was giving to the plaintiff for the maintenance and support of herself and three minor children was ample for the purpose, and admitted that the defendant's then salary was Forty-six Hundred Dollars per annum; said Answer also charged that the plaintiff's action in causing his arrest on the 4th day of February, 1930, was the cause of the separation of the parties; he denied that he had violated any terms or conditions of the reconciliation, effected shortly after the decree of June 5, 1925, was passed, denied that there was ever any reason for his promising to behave himself, and asserted that he had always conducted himself properly toward the plaintiff and said children; the Answer also contained charges that the plaintiff had attempted to poison the minds of the children against him, and denied that said children were afraid of him, but, on the contrary, alleged that they were afraid of their Mother; said Answer also claimed inability of defendant to furnish bond, and averred that the defendant had no idea of leaving the jurisdiction pending said proceedings; the Answer contained many other allegations against the plaintiff, and reference is made to said Answer for the details thereof.

On April 11, 1930, the plaintiff filed a Reply to the Answer filed by the defendant (Record, page 28). This Reply of the plaintiff denied all the allegations of the defendant as to the plaintiff's conduct and attitude towards the defendant, denied that the plaintiff was extravagant and denied that the plaintiff was in any wise responsible for the separation of the couple on February 4, 1930; the said Reply of the plaintiff also denied that she was exceedingly nervous or vindic-

tive, or that she had nagged the defendant in any manner whatever, and also denied that she was possessed of an ungovernable temper, all of which were alleged against her in said Answer, but, on the contrary, said that she had endured patiently for seventeen years, with few interruptions, a life of torture, endeavoring to please, placate, mollify, and live with the defendant, an irrational, unreasonable, temperamental, and erratic personage, to say nothing of many other qualities possessed by him, and which were mentioned in the original petition filed by the plaintiff; the plaintiff also denied defendant's claim that he had spent every dollar of his salary between July, 1925, and February, 1930, for the comfort and support of the plaintiff and their children, but, on the contrary, averred that the defendant used all of his salary in the furtherance of his own pleasures, pastimes and comfort, paying cash therefor, and charging all household bills and other items, so that he became largely indebted to various firms throughout the District, and she averred that the defendant had been in debt since their marriage, seventeen years before, and that the bills owed by the defendant and mentioned in his Answer had been owing for many years, many of them were barred by the Statute of Limitations, some he had paid nothing on, and on others very little, and that many of the bills listed by the defendant were bills which he had previously told her had been paid. The plaintiff, in said Reply, further showed that the defendant had failed to make payments on the first and second trusts on the home property, and that it was about to be foreclosed through the defendant's neglect, and that she, the plaintiff, had not sought to sell the house herself, as alleged by the defendant in his said Answer; plaintiff in said Reply denied that she and the children were adequately supported, as claimed by defendant; plaintiff

further denied that in negotiating a settlement of their marital difficulties, she, or anyone representing her, made any threats against the defendant, as set up in defendant's Answer, but admitted that she did request the defendant, for his own good, to go to some hospital for treatment for his nervous and mental condition, which the defendant refused to do; the said Reply of the plaintiff made other denials of defendant's allegations, and a reference thereto (Record, page 28) is invited for further particulars as to said denials.

On April 11, 1930, the defendant, Robert G. Merritt, filed an affidavit (Record, page 34), in which he averred that the plaintiff was not devoting all of her time to the care of the youngest child, denying that he ever threatened to kill anyone with poison, and alleging that he had been unable to meet financial obligations promptly because he had not sufficient money over and above the current expenses of his home with which to curtail these items; said affidavit also alleged that the holders of the second trust on the home property did not contemplate immediate foreclosure, and that the home could be occupied by the plaintiff and the children until at least July of 1930; said affidavit also contained an allegation that the plaintiff had put the youngest child in either a kindergarten or an infants' home; there are other allegations in said affidavit, reference to which is hereby made.

On April 11, 1930, the matter was called up before the Honorable Alfred A. Wheat, one of the Justices of the Supreme Court of the District of Columbia, sitting in Equity Branch, a rule to show cause having been issued against the defendant upon the aforesaid petition of March 31, 1930. Counsel for each side stated briefly the nature of the case, and the Court was requested by plaintiff's counsel to set a day for a hearing of the case on the pleadings and evidence to be adduced in support thereof. What happened at

this preliminary presentation of the matter is recorded in the Bill of Exceptions (Record, page 39). Plaintiff's counsel contended that it was not competent for the Court to make any final disposition of said petition without the taking of evidence given subject to cross examination upon the controverted matters of fact raised by said petition, defendant's Answer thereto, plaintiff's Reply to said Answer, and defendant's affidavit, which evidence counsel for plaintiff announced readiness to proceed with, then or at any other time. The Court overruled said contention, and declined to allow the taking of any evidence subject to cross examination, to which ruling counsel for plaintiff then and there excepted, and the same was duly entered upon the minutes of the Court. (Record, page 39.)

The Record shows further what transpired on April 16, 1930. The Court signed a decree in the following words and figures:

"This matter came on to be heard on the petition of the plaintiff, Helen P. Merritt, to modify the certain decree entered in the above entitled cause on June 5, 1925, the rule to show cause issued thereon against the defendant, Robert G. Merritt, the answer of the defendant to the said petition and rule, the reply of plaintiff to said answer, and the affidavit of defendant, and was duly argued in open Court by counsel; in consideration whereof it is by the Court this 16th day of April, A. D. 1930,

"Adjudged and ordered that the petition of the plaintiff to modify the certain decree above referred to be and the same is hereby overruled, and the rule issued thereon be and the same is hereby discharged, and the said decree of June 5, 1925, be and the same is hereby continued in full force and effect.

"By the court:

(Record, page 36.)

"ALFRED A. WHEAT,
"Justice."

The Bill of Exceptions (Record, page 39) shows that at the time of the entry of said order of April 16, 1930, counsel for the plaintiff objected and excepted to any final disposition of said petition without allowing evidence to be taken subject to cross examination upon the controverted matters of fact, as aforesaid, and such exception was then and there duly entered upon the minutes of the Court.

ASSIGNMENT OF ERRORS.

The assignment of errors, filed by the plaintiff, April 19, 1930, follows:

"The plaintiff respectfully assigns the following as errors committed by the Court in its order herein of April 16, 1930:

"1. In overruling plaintiff's petition filed March 31, 1930.

"2. No ground existed in the exercise of a sound judicial discretion for denying the prayers of plaintiff's said petition.

"3. In not treating the averments of plaintiff's said petition as true, and the statements at variance therewith contained in defendant's answer as untrue, in view of plaintiff's insistence upon her right to take evidence upon the controverted matters, and the defendant's submission without evidence.

"4. In finally disposing of plaintiff's said petition and denying relief prayed therein, without permitting the taking of evidence subject to cross examination upon the controverted matters of fact raised by said petition, defendant's answer thereto, plaintiff's reply to said answer, and defendant's affidavit.

"5. In denying plaintiff's right to a reasonable increase of maintenance allowance by reason of changed conditions since the decree of June 5, 1925.

"6. In denying an award to the plaintiff of the custody of the youngest child.

"7. In denying an injunction to prevent the defendant from having the custody or control of the children at any time.

"8. In denying an award against defendant of reasonable counsel fees herein for plaintiff and the costs of the proceeding.

"9. In denying an order against the defendant requiring him to remain in the District of Columbia, and to give bond to protect the plaintiff in obtaining compliance by him with the Court's orders herein.

"GEO. C. SHINN,

"GEO. E. SULLIVAN,

"Attorneys for Plaintiff."

(Record, pages 36 and 37.)

ARGUMENT.

This case may be treated under two separate propositions:

First, errors assigned in the action of the Justice of the Supreme Court of the District of Columbia, in treating the case as submitted solely on the pleadings, contrary to the Record, and in disposing of the issues involved, summarily, without the taking of evidence on the controverted matters of fact raised by the pleadings, all over the protests and exceptions of the appellant.

Second, errors assigned, in that no ground existed, in the exercise of a sound judicial discretion, for denying the prayers of appellant's petition, or for denying appellant's right to a reasonable increase of maintenance allowance by reason of changed conditions since the passage of the original decree of June 5, 1925; or for

denying to appellant, the custody of the youngest child; or for denying the appellant an injunction to prevent the appellee (defendant below) from having the custody or control of the children at any time, or for denying an award against appellee of reasonable counsel fees for appellant and the costs of the proceeding, or for denying the appellant an order against the appellee, requiring him to remain in the District of Columbia and to give bond to protect the appellant in obtaining compliance by him with the Court's orders.

Under the first proposition, it is contended that the Court plainly erred in depriving the appellant of her day in Court.

The decree of June 5, 1925, providing for the custody and control of the children, and for maintenance to the wife and children, remained under the control of the Equity Court for future orders and decrees in respect thereto, as the changed conditions might require. This proposition is established by a long line of decisions in this Court. Equity has inherent jurisdiction, irrespective of statute, in such matters and may retain that jurisdiction so long as it may be necessary to do complete justice. Certain sections of the Code deal with such matters, but they do not, however, abrogate or alter the inherent power of the Equity Court to deal with alimony and the custody of children, and the decrees of said Court are at all times subject to its control. The Code Sections referred to are as follows: Section 975, dealing with alimony pendente lite, and providing how the Court may enforce the same; Section 976, authorizing the Court to decree permanent alimony and to enforce payment of the same; Section 978, providing that after a decree of divorce in any case granting alimony and providing for the care and custody of children, the case shall still be considered open for any future orders in those respects; and Section 980,

providing that whenever any husband shall fail or refuse to maintain his wife and minor children, if any, although able so to do, the Court, on application of the wife, may decree that he shall pay her such sums as would be allowed to her as permanent alimony in case of divorce, for the maintenance of herself and minor children, and providing also for enforcement of payment of the same. These Sections of the Code have been considered in cases which we will cite hereinafter.

As showing how these powers of the Equity Court have been sustained in this jurisdiction, we cite the following cases:

Tolman vs. Tolman, 1 App. D. C. 299, involved an appeal from an order of the Supreme Court of the District of Columbia, holding an Equity term, allowing alimony pendente lite and counsel fees in a suit for permanent alimony, in which this Court held that there is jurisdiction in the Supreme Court of the District of Columbia, exercising Equity powers, to grant alimony as permanent relief, grounded upon causes other than those in which judicial separation or divorce a mensa et thoro could be decreed by the Ecclesiastical Courts of England. In said Ecclesiastical Courts, alimony could only be obtained as a consequence of a divorce a mensa et thoro, but, as stated before, this Court held that there was no such limitation on the power of the Equity Courts of this District. This cited case has been referred to by this Court in subsequent opinions and established the full jurisdiction of the Equity Courts here to grant not only permanent alimony, but temporary alimony.

Alexander vs. Alexander, 13 App. D. C. 334, decided November 1, 1898. This case involved an appeal by complainant from a decree of the Supreme Court of the District of Columbia, dismissing a Bill

of Review. The Lower Court had passed a decree of divorce, and allowed the complainant wife permanent alimony. There were many proceedings, covering a period of years, reopening the case for increases and reductions of the alimony, all of which finally culminated in a Bill of Review, which brought up to this Court the question, among others, of whether a decree for permanent alimony may be reopened for further orders and decrees respecting the amount of alimony to be paid. The Court held that such decrees for alimony are at all times under the control of the Court, and may be modified from time to time as the circumstances warrant, even though the decree itself is silent as to the right of either party to apply to the Court for such modification of the decree. The Court furthermore said: “. . . In the case of the custody and maintenance of children of an unhappy marriage, the Court must necessarily retain a continuous jurisdiction. The enforcement of the payment of alimony implies a continuous jurisdiction” In another part of the opinion, the Court says: “Undoubtedly, decrees for the allowance of alimony are in a certain sense to be regarded as final. They are final and conclusive until for good cause accruing thereafter, they are changed or modified; and, in general, it is only for after accruing cause that they may be modified.”

The opinion is so lengthy that it would tend to prolixity if it were quoted in extenso, but the Court is respectfully referred to the case for a comprehensive statement which this Court has made of the law on the subject.

Lesh vs. Lesh, 21 App. D. C. 475. In this case, the Court was considering an interlocutory order for alimony which it held to be an appealable order. In commenting on the power and jurisdiction of the Equity Courts in matters of alimony, this Court made

the statement that it was the intention of the statute to enlarge, rather than to restrict, the jurisdiction of Courts of Equity in such matters.

Demonet vs. Burkart, 23 App. D. C. 316, in which case a decree of divorce a vinculo contained a provision for the payment of alimony by the defendant at a specified rate until further order of the Court, and this Court held that said decree was not final so far as the payment of alimony was concerned, but remained within the jurisdiction of the Court to thereafter require the defendant to pay to the complainant arrears of alimony accruing after the date of the decree until the date of her second marriage, together with costs of suit. The case last mentioned also recognized the general doctrine that jurisdiction over the custody and support of children in divorce cases is a continuing one.

Bernsdorff vs. Bernsdorff, 26 App. D. C. 520, was an appeal from a decree ordering the defendant to pay to the plaintiff the sum of Twenty-five Dollars per month for the maintenance of herself and infant child. The Bill of Complaint, while containing some allegations more appropriate in one for legal separation from bed and board, under Section 966 of the Code, was treated by this Court as substantially one for maintenance only, as provided in Section 980 of the Code. This Court held that the amount and continuation of an allowance by the Equity Court to a wife, by the husband, for the support and maintenance of herself and child, in a suit for that purpose, remained subject to the control of that Court. The decision also pointed out that should the parties become reconciled, or should the husband, in good faith, procure a suitable home for the wife, which she refused to accept, these would afford grounds for discharging the husband from the further duty of maintenance. It so happened in

the case last cited that the husband's alleged selection of a new home for the wife was not considered by this Court as sufficient under the circumstances, and the decree of the lower Court against the husband was affirmed.

Marschalk vs. Marschalk, 45 App. D. C. 455. This was a suit for maintenance where the lower Court, after hearing all the testimony, passed a decree requiring the defendant to pay the plaintiff Forty Dollars per month for her support, from which order the defendant appealed. This Court held that the wife was not compelled to give up a home which had been purchased, in order to follow the defendant to another home he had established, and refused to interfere with the decree of the lower Court. The Court held that the decree should apply so long as the defendant should remain away from the wife and might be suspended by the husband's return to the house which had been acquired as a home.

Caffrey vs. Caffrey, 55 App. D. C. 285. In this case, the lower Court remitted over-due alimony which had accrued under a prior decree in favor of the plaintiff. The plaintiff appealed and the decree of the lower Court was reversed. This Court held that a retroactive effect should not be given to the exercise of any power to recast a decree, and that the modification of a decree for alimony, if made, would operate prospectively only, and that the decree is final as to the installments of alimony in arrears. This Court held that the power to modify the alimony decree was no more than to authorize the Court, as conditions change, to alter or modify its decree as to future payments of alimony, citing *Phillips vs. Kepler*, 47 App. D. C. 384.

Elkins vs. Elkins, 55 App. D. C., page 9. In this case, the defendant was adjudged guilty of contempt for failing to pay certain sums of money for the mainte-

nance of his minor child, and he appealed from the judgment of the Court below. This Court affirmed the lower Court's decree, and in doing so, held that when chancery once acquires jurisdiction over a subject matter, it will continue to exercise that jurisdiction as long as necessary in order to grant full and final relief. It further held that a Court, by commencement of a divorce suit, acquires jurisdiction over the defendant for purposes, not only of divorce and alimony issues, but also those relating to maintenance of a child, and that jurisdiction continues as long as necessary to make effective the Court's decrees. This Court, in addition, held that though there is no reservation in a divorce decree granting alimony and custody of a child to its mother, the Court may afterwards add an order giving the custody of the child to the mother, and decreeing its future support against the father.

If, as we have shown, the decree in the instant case, of June 5, 1925, was under the continuing control of the lower Court, and subject to be reopened and revised or modified upon a new state of facts, then it manifestly was the duty of the lower Court to grant a hearing in the case, including the taking of testimony of witnesses to determine what these changed conditions, if any, might be.

The fundamental law of the land from time immemorial has insured to litigants the right of trial. At law this right is generally referred to as a "trial"—in equity, a "hearing."

"If the bill states a case for equitable relief and the answer sets up matter sufficient to bar it, *an issue of fact* is created and proof must be taken to determine the controversy." Jones on Equity Pl. and Pr., page 132.

We quote from 10 Ency. Pl. & Pr., page 8:

"The trial of a chancery suit is called a hearing, and technically considered this includes not only the introduction of the evidence and the arguments of the solicitors, but the pronouncing of the decree by the chancellor," citing *Babcock vs. Wolf*, 70 Iowa 679, and *Akerly vs. Vilas*, 24 Wisc. 171.

Even in mere preliminary matters, the Courts have frequently, where the interests of justice required, heard oral testimony (in addition to the pleadings) touching the issues. We may mention one case in this Court, where, on a hearing for pendente lite maintenance, the lower Court took testimony. *Lesh vs. Lesh*, supra.

We next will consider some cases decided by this Court, in which the principle contended for has been recognized both in law and in equity courts.

In *Robinson vs. Morrison*, 2 App. D. C. 105, this Court held that in an attachment suit where the defendant filed an affidavit traversing the plaintiff's affidavit, upon which the attachment was issued, the questions of whether or not the plaintiff's affidavit was true, and whether or not there was just ground for issuing the attachment, should be determined, not upon the affidavits, but upon the statements of witnesses examined orally before the Court.

In *Fischer vs. Munsey Trust Company*, 44 App. D. C. 212, a plea in abatement was filed, attacking the service of process on a defendant in a law case. This Court held that on the issues of fact, the defendant was entitled to a trial by jury.

In *O'Donnell vs. Beechnut Packing Co.*, 45 App. D. C. 425, the issue as to the due service of process on a non-resident corporation was held triable by jury.

Brick Co. vs. Trott, 16 App. D. C., page 293, was

an equity suit involving the enforcement of a mechanics lien. The lower Court passed a decree dismissing the Bill in Equity, after the cause had been set down for hearing by one of the several defendants upon bill, answer, and replication and a decree pro confesso against certain of the defendants. This Court reversed the cause, because, as the opinion explains, the action of the defendant in setting down the case for hearing on bill, answer and replication deprived the plaintiff of his right to establish the material facts charged in his bill, and of the right to controvert and disprove the averments of the answer. It will be noted that the case just cited is similar to the one at bar. A petition was filed by the plaintiff, an answer interposed by the defendant, and a reply or replication to the answer was filed by the plaintiff, thus making up an issue for trial. In the instant case, the same procedure obtained. In the cited case, however, the defendant "set the cause down for hearing on the bill, answer of Samuel E. Rabbitt thereto, and the replication to said answer, and the decree pro confesso, against his codefendants." In the instant case, neither party set the case down for hearing. The Court refused to allow the plaintiff to set the case down for hearing of testimony, but decided it on the pleadings, after counsel in the few minutes allowed for such purpose explained the nature of the case and requested that testimony be taken either then or later.

This Court, during the discussion of the Brick Co. vs. Trott case, in its opinion, said:

"It is certainly not within the power of the defendant, by setting the case down for hearing on such state of pleading, to deprive the plaintiff of the right to establish the material facts charged in his bill, nor to deprive him of the right to controvert and disprove the averments of the answer. In order to make an issue to enable

the plaintiff to establish the facts alleged in his bill and to deny and controvert those set up in the answer, a replication is essential. A general replication, such as was interposed by the plaintiff in this case, and which is now alone used in our equity practice, is a general denial of the truth of the defendant's plea or answer, and of the sufficiency of the matter alleged in it to bar the plaintiff's suit, and an assertion of the truth and sufficiency of the bill. Cooper Eq. Pl., 329, 330; Mitf. Eq. Pl., 321, 322; Sto. Eq. Pl., Sec. 878. For the form of the general replication when extended in full, see Barton's Suit in Equity, 144, 145, and Sto. Eq. Pl., Sec. 878, in note. With the replication standing in the case, and no such facts admitted by the answer as will support the claim set up by the plaintiff in his bill, it would seem to be quite impossible that the merits of the case, whatever they may be, could have been reached and considered upon such a submission of the case."

In the same case, this Court also said:

"It is very clear, we think, that the cause was improvidently and improperly set down for hearing by the defendant, on the bill, answer and general replication; as by setting the case down for hearing on such state of pleading we can not suppose it was the intention of the defendant to waive or abandon his answer, and to submit the case on the allegations of the bill alone."

In *Marschalk vs. Marschalk*, supra, this Court commented on the fact that the lower Court had arrived at its conclusions "after hearing all the evidence and considering the difficulties of the parties."

In *Rhodes vs. Rhodes*, 36 App. D. C. 261, a suit for alimony alone, no divorce being requested, this Court held that the Supreme Court of the District of Columbia, sitting as a Court of Equity, has jurisdiction

to grant alimony as independent relief, and that the decree of the lower Court for "permanent alimony" did not transport the decree to a finality, so as to prevent the Court from having and maintaining jurisdiction over the same for purposes of modification. No evidence was taken in the cause, nor was there either demurrer or replication to the respondent's answer to the rule to show cause. The order of the lower Court required the defendant to pay Twenty-five Dollars on the first and fifteenth of every month, as permanent alimony, and counsel fees, from which order the defendant appealed to this Court. We quote from this Court's decision in the case cited, as follows:

"As there was no replication or denial of the facts alleged, and the hearing was on the petition and answer, the facts alleged in the answer must be taken as true. *Arnold vs. Carter*, 19 App. D. C. 259, 264; *Alfred Richards Brick Co. vs. Trott*, 16 App. D. C. 293-299. As was said in the case last cited: 'If the plaintiff concludes to set down the cause for hearing upon bill and answer, the case is quite different. In that case, it behooves the plaintiff, however, to consider well whether he will rest his case upon the bill and answer, or whether he will reply to the answer; for it must be borne in mind that, in a hearing upon a bill and answer, the answer will be taken to be true in every point and particular, because the defendant has been, by the action of the plaintiff, precluded from substantiating it by proof. The plaintiff should be careful, therefore, to look attentively into the answer, and see that the effect of the defendant's admissions is not avoided by any new matter. If such should be the case, he should reply to the answer, and proceed to *establish his case by evidence*. It may sometimes, also, be found to be necessary to reply to the answer in order to put the defendant to the proof

of the allegations of his answer; as where he confesses the matter alleged by the plaintiff, but sets forth some further matter in avoidance or in bar of the plaintiff's equity.' See also *Bohrer vs. Otterback*, 2 App. D. C. 78-79."

On the second proposition, mentioned at the outset of the argument herein, we contend that a mere reading of the errors assigned thereunder, coupled with a review of the pleadings, carry one's mind to the irresistible conclusion that the due administration of justice requires the correction of such errors. Plainly, the undisputed facts, with regard to the altered circumstances—the additional child to be supported, and the absence of plaintiff's personal service income, which was being received when the original decree was entered—required the Court below, in the exercise of a sound judicial discretion, to do something beyond passing a mere order that "the said decree of June 5, 1925, be and the same is hereby continued in full force and effect." Five years before, when the decree of June 5, 1925, was passed, the wife, who then was allowed \$100.00 per month for maintenance, was herself employed receiving \$1,400.00 per annum, whereas on April 16, 1930, she was unemployed and unable to find employment. She had *two* children to support in 1925, and *three* in 1930; the husband was admittedly employed in 1930 at the Income Tax Division of the Treasury Department, receiving a salary of Forty-five or Forty-six Hundred Dollars per annum, (or more than Three Hundred and Eighty Dollars per month), yet the wife, by said decree of April 16, 1930, and, under such admittedly changed conditions, is required to rent a home and maintain herself and three children on the same amount that had been adjudged to be required for herself and two children when she had an income of \$1,400.00 of her own.

Further, it is shown by the record that the youngest child, a mere baby (born after the decree of June 5, 1925), was living with the mother and the petition of the appellant prayed for the custody and control of this child. The decree complained of left the matter of custody of this child "dangling in the air," as no provision was incorporated in said decree for her custody and control.

The appellant's financial condition, as the record shows, made out a case, without question, for assistance in the matter of counsel fees and costs, yet the decree of April 16, 1930, made no provision whatever for the same.

Other prayers of the plaintiff's said petition received a similar fate, as those hereinbefore recited, and we respectfully submit that the whole procedure, and the decree appealed from in the lower Court, was not consonant with the exercise of a sound judicial discretion.

We respectfully submit that the decree of the lower Court should be reversed and the cause remanded for further proceedings.

Respectfully submitted,

GEORGE C. SHINN,
GEORGE E. SULLIVAN,
Attorneys for Appellant.

